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No. 04-105, 04-104

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

United States,
*Petitioner,*

v.

Freddie J. Booker,
*Respondent.*

United States,
*Petitioner,*

v.

Ducan Fanfan,
*Respondent.*

On Writ of Certiorari to the United States Courts of Appeals
for the First and Seventh Circuits

## BRIEF *AMICUS CURIAE* OF THOMAS F. LIOTTI, ESQ. IN SUPPORT OF RESPONDENTS

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September 21, 2004

## QUESTIONS PRESENTED

1. Whether a District Court violates the Fifth and Sixth Amendments by relying upon facts that increase the maximum sentence available under the United States Sentencing Guidelines (other than the fact of a prior conviction) when those facts were not charged in the indictment and either found by the jury on proof beyond a reasonable doubt or admitted by the defendant.

2. If the answer to the first question is "yes," the following question is presented: What role do the Sentencing Reform Act, the Sentencing Guidelines, and Federal Rule of Criminal Procedure 32 continue to play in federal criminal sentencing?

## TABLE OF CONTENTS

QUESTIONS PRESENTED.....ii

TABLE OF CONTENTS .....iii

TABLE OF AUTHORITIES.....iv

BRIEF OF *AMICUS CURIAE*
THOMAS F. LIOTTI, ESQ.....1

INTERESTS OF *AMICUS CURIAE*.....1

STATUTES INVOLVED.....6

SUMMARY OF ARGUMENT.....6

ARGUMENT.....6

I. Under *Blakely*, the Federal Sentencing Guidelines Violate the Sixth Amendment.....6

A. The Sixth Amendment Protects Against Encroachments on the Right to Jury Trial by Any Branch of Government.....9

1. Congress Controls the Guidelines Through its Enactment of Mandatory Minimum Sentences.....9

II. The Sentencing Reform Act, Guidelines and Federal Rule of Criminal Procedure 32 are all Unconstitutional as Presently Applied.....11

CONCLUSION.....15

## TABLE OF AUTHORITIES

Page

CASES

Apprendi v. New Jersey,
530 U.S. 466, 120 S.Ct. 2348 (2000) . . . . . 4

Blakely v. Washington,
124 S.Ct. 2531, 2004 U.S. LEXIS 4573 . . . . .4

Crawford v. Washington,
124 S.Ct. 1354, 158 L.Ed2d 177 (2004) . . . . .9(n.8)

Jenkins v. Coombe,
821 F. 2d 158 (1987) . . . . . .2(n.2)

State of Alabama v. Shelton,
122 S. Ct. 1764 (2002) . . . . . 3(n.4)

U.S. v. Fatico,
603 F.2d 1053 (1979) . . . . . 8(n.8)

U.S. v. Leach,
USDC ED PA. CR. No. 02-172-14,
2004 U.S. Dist. LEXIS 13291 . . . . . 4(n.6)

U.S. v. Moises,
2001 WL 563469 (SDNY) . . . . . 7

U.S. v. Rojas,
CR-03-14-1 (Dalzell, J.) . . . . . .4(n.6)

STATUTES

18 U.S.C. § 924(c) . . . . . .9

18 U.S.C. § 3553(e) . . . . . .10

18 U.S.C. § 3742 . . . . . .6

21 U.S.C. 841 . . . . . 9

Sentencing Reform Act of 1984,
28 U.S.C. § 994(h) . . . . . 5(n.7)

28 U.S.C. § 994(a) . . . . . .6

U.S. CONSTITUTION

Sixth Amendment . . . . . 9

OTHER

Thomas F. Liotti, *Departing From the Federal Sentencing Guidelines*, The Verdict, July, 1998 at 1 through 13 . . . . . 2

Thomas F. Liotti, *Does Gideon Still Make A Difference*?, 2 N.Y.C. L. Rev. 105 (1998) . .3

*Court Follows 'Apprendi v. New Jersey' In Preparing To Determine Proper Sentence*, New York Law Journal, June 13, 2001 at 24, col. 5 . . . . . .7

Thomas F. Liotti, *A War On Drugs: At What Cost To Our Liberty*?, Perspective, New York

Law Journal, February 28, 1990 at 2 . . . . . 9

U.S. Sentencing Comm'n., *Special Report to Congress: Mandatory Minimum Penalties in the Criminal Justice System* (1991) . . . . . 10

Ian Weinstein, *Fifteen Years After The Federal Sentencing Revolution: How Mandatory Minimums Have Undermined Effective and Just Narcotics Sentencing*, 40 Am. Crim. L. Rev. 87, 99 & n.56 (2003) . .10

Justice Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 14-SPG Crim. Justice 28, 33 (1999) . . . . . .11

Nancy J. King & Roosevelt L. Noble, *Felony Jury Sentencing in Practice: A Three-State Study*, 57 Vand. L. Rev. 885, 886 (2004) . . . . 11

Daniel Wise, *Justice Department Directive Curtails Prison Bureau Practice, Dozens of Inmates Seek to Preserve Assignments to Halfway Houses*, New York Law Journal, January 31, 2003 at 1 and 3. . . . . 12

Deborah Pines, *Ten Years Later, Federal Sentencing Guidelines Go Down Easier, Seen As Allowing Judges More Flexibility Than Anticipated*, New York Law Journal, November 3, 1997 at 1, 6 and 7 . . . . . .13



## BRIEF OF *AMICUS CURIAE* THOMAS F. LIOTTI, ESQ.

Thomas F. Liotti, Esq. files this *amicus curiae* brief pursuant to this Court's Rule 37.3(a) in support of respondents Freddie J. Booker (No. 04-104) and Duncan Fanfan (No. 04-105) assertion of rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution. Both petitioner and respondents have granted *amicus* consent to file this brief, and letters of consent have been filed with the Clerk of this Court.[1]

## INTEREST OF *AMICUS CURIAE*

This *amicus curiae* counsel has been practicing for more than 27 years. My practice has been devoted to litigation, trials and appeals in State and Federal Courts. I am a Past President of the Columbian Lawyers' Association of Nassau County; the Criminal Courts Bar Association of Nassau County

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[1] No counsel for any party to this case authored this brief in whole or in part, and no person or entity, made any monetary contribution to its preparation or submission. *Amicus curiae* appears in this case *pro bono publico*, entirely at his own cost and expense. See Rule 37.6. The petitioner and respondent have consented to the filing of this brief, and amicus has filed the letters of consent with the Clerk of the Court. pursuant to Rule 37.3(a). This *amicus curiae* requested the aforesaid consent of counsel on or about August 27, 2004 but did not receive consent until very late in the afternoon of September 20, 2004, less than 24 hours prior to the filing deadline for this brief, to wit: September 21, 2004 at or before 3 p.m. *Amicus curiae* is honored to receive the consent of all counsel and will labor through the night to meet the Court's filing deadline since I have assured my esteemed colleagues that I will do so. This Court has scheduled an expedited appeal in this case where oral arguments will be heard on October 4, 2004, the first day of the Court's 2004-2005 session and calendar.

(Founded in 1953); the New York State Association of Criminal Defense Lawyers and the Immediate Past Chair of the New York State Bar Association Criminal Justice Section. I am also a Life Member of the National Association of Criminal Defense Lawyers (Founded in 1958) and a Fellow in the American Board of Criminal Lawyers. I have been a member of this Court's Bar since January 19, 1988. I have never been a prosecutor, but I have been a part-time Village Justice in Westbury, New York for thirteen and one-half years. I am a former member of the Criminal Justice Act Panels in the Southern District of New York and the Eastern District of New York. I remain a member of the Criminal Justice Act Panel for the Second Circuit Court of Appeals. In my years of practice I have represented thousands of defendants and tried in excess of one hundred felony, jury trials. I have argued in excess of one hundred appeals in State and Federal Courts. My cases have been cited *with favor* by this Court.[2]

In the aforementioned capacities, *amicus curiae* counsel's name appears as the attorney of record in several hundred reported decisions. He has authored over one hundred legal articles[3] and published more legal opinions than any other Village or Town Justice within the State of New York. He has co-authored three books, all dealing with the subject of criminal law. *Amicus curiae* has lectured before a great many bar associations and law schools on a variety of subjects concerning the criminal law, including sentencing issues.

In 2002 I was privileged to successfully co-author an

[2] See Jenkins v. Coombe, 821 F. 2d 158 (1987).

[3] See *eg.* Thomas F. Liotti, Departing From The Federal Sentencing Guidelines, The Verdict, July, 1998 at 1 through 13.



*amicus curiae* brief[4] before this Court with distinguished counsel and Professor Steven Duke of the Yale Law School, Professor Adriaan Lanni of Harvard University and David M. Porter, Esq. on behalf of the National Association of Criminal Defense Lawyers.[5] Professor Duke was asked by the Court to argue the brief before it.

While *amicus curiae* counsel does not represent an organization and his views herein are not offered on behalf of an organization, he nonetheless verily believes that his views are those of a great many lawyers and Judges. Indeed many of our esteemed Judges in New York have protested the existence of the Guidelines. One of our Judges in the Southern District of New York actually resigned his seat on the Bench, in part due to his frustration at having to sentence people under the arcane, technical and anti-human guidelines. Quite simply, since the enactment of the Federal Sentencing Guidelines on November 1, 1987, Judges, juries and advocates (except prosecutors) have all been denuded of their functions. Juries do not participate in sentencing; Judges are sworn to follow the Federal Sentencing Guidelines and their departures are now questioned. In the last 25 years penalties and sentences are more severe, there are fewer and fewer trials, more defendants cooperate and prosecutors decide who will be permitted to cooperate, what sentences will be and the extent to which anyone receives credit for their cooperation. While the Federal

[4] State of Alabama v. Shelton, 122 S.Ct. 1764 (2002).

[5] Professor Lanni and Mr. Porter were Of Counsel on that brief. Professor Duke and this *amicus curiae* wrote the brief. This *amicus curiae*'s Law Review article was referred to therein. See Thomas F. Liotti, Does Gideon Still Make A Difference?, 2 N.Y.C.L. Rev. 105 (1998).

Sentencing Guidelines may have had a laudable purpose when its authors attempted to mete out disparities in sentencing by their implementation, the Guidelines have become a hodgepodge, a veritable Frankenstein monster of disjointed parts. The uniqueness of individuals and cases has been consigned to a conveyor belt to our federal penitentiaries.

Incredibly today nearly all defendants are compelled to plead guilty to felony charges and then go to jail. There is little in the way of real plea bargaining because federal prosecutors have the weapon of the Federal Sentencing Guidelines in their already overpowering arsenal. All of this one sidedness is bringing us closer and closer to a tyranny, something our Founders feared when they established this great Republic, providing for a Bill of Rights and trial by juries.

In this case *amicus curiae* clients, past, present and future all have interests that may be affected by the outcome of the decision in this case. Following this Court's learned opinions in Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348 (2000) and Blakeley v. Washington, 124 S.Ct. 2531, 2004 U.S. LEXIS 4573, Judges and lawyers across the land have attempted to interpret the Court's decisions. Some have said that the Guidelines are unconstitutional[6] while others have said that they are. Still others have taken no position and adjourned all sentences until after this Court decides the extant appeals.

This *amicus curiae* takes these extraordinary measures

[6] See U.S. v. Leach, USDC ED PA. Cr. No. 02-172-14, 2004 U.S. Dist. LEXIS 13291 (Dalzell, J., 7/12/04). In U.S. v. Rojas, CR-03-14-1, Judge Dalzell imposed a statutory minimum of ten years after the Government conceded the defendant's minimum role, thus obviating the application of departure under the Federal Sentencing Guidelines.



to stand against the tyranny that has become the Federal Sentencing Guidelines. *Amicus curiae* urges the Court to harken back to a time when sentencing was not controlled by grids, levels, categories and points, but concerned itself with human beings, defendants and victims. We may live in a technical, computer age but we should fight against the replacement of our human spirit with mechanized sentencing. We are not yet a nation of robots and automatons. We should never become one.

Under our current system of sentencing Judges are hard pressed to reflect upon their life experience or to apply same at sentencings. Lawyers have lost their roles as advocates, instead they are victims of the Guidelines. It is not surprising that the United States Sentencing Commission has filed an *amicus curiae* brief seeking to preserve the *status quo* and themselves. The Sentencing Commission has become an arm of the prosecution or nearly a fourth branch of government. In the 20 years of their existence they have arrogated more and more power to themselves. If we do not stop now, then in our lifetimes computers will supersede the judicial, jury and lawyer functions. Computers will tell us if a burden of proof has been met. They will quantify guilt or innocence, naturally favoring cold, hard facts and guilt in most cases. This Court has the power to stop the accentuation away from the Bill of Rights and to take us "back to the future", back to pre-November 1, 1987.[7] This *amicus curiae* believes that his advocacy or dialogue at sentencing proceedings are analogous to the movie scenes between Hal, the computer and Dave, the human in 2001 A

[7] The Court should re-visit and strike down the Sentencing Reform Act of 1984 (28 U.S.C. § 994(h)). To adhere to *stare decisis* under these circumstances would be, as Emerson wrote: "A foolish consistency is the hobgoblin of little minds."

Space Odyssey.

Not incredibly, the states are beginning to replicate the Federal Sentencing Guidelines. The denuding of the judiciary, the advocates and juries has begun in state courts as well. The Guidelines are no longer what they promised to be. They are not Guidelines at all. They are extremely rigid and their application is not discretionary but rather, mandatory. Departures may be appealed but a failure to depart is not. 28 U.S.C. § 994(a) *et. seq.* and 18 U.S.C. § 3742.

## STATUTES INVOLVED

The Federal Sentencing Guidelines as promulgated by the United States Sentencing Commission created pursuant to the Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984). 28 U.S.C. § 994(a).

## SUMMARY OF ARGUMENT

It is improper for Judges or prosecutors to decide questions of fact that are the sole and exclusive province of the jury. Elements of crimes and enhancement provisions of the Guidelines should be decided by juries, the Judges of the facts.

A Federal District Court violates the Fifth and Sixth Amendment rights of a criminal defendant when it relies on facts not charged in the indictment, and not found by a jury beyond a reasonable doubt, nor admitted by the defendant, to increase the maximum sentence dictated by the United States Sentencing Guidelines (Guidelines).

The right of a criminal defendant to trial by jury is



enshrined in Constitutional provisions and cannot be infringed by actions of the federal government by they legislative, judicial, executive or delegated administrative functions.

The second question presented by these cases addresses the consequence of a determination by this Court that the Guidelines are subject to the holding of *Blakely*.

This Court should hold that, in the interim, sentencing will follow the process *already employed* by the Department of Justice. The government will allege in indictments those facts that give rise to enhanced sentences under a revised Guideline. In those few cases that do not result in a plea bargain, the same jury that determined guilt will decide the facts relevant to the enhancement in a bifurcated proceeding under the traditional "beyond a reasonable doubt" standard, much as what presently occurs in some capital cases. The jury would itself have no sentencing authority. Judges instead would exercise their discretion to impose sentences in the range determined by the Guideline provisions applicable to the facts found by the jury.

## ARGUMENT

### I. Under *Blakely*, the Federal Sentencing Guidelines Violate the Sixth Amendment

In United States v. Juan Moises, 2001 WL 563469 (SDNY) Hon. William Pauley, Court Follows 'Apprendi v. New Jersey' In Preparing To Determine Proper Sentence and New York Law Journal, June 13, 2001 at 24, col. 5, the Court granted a so-called *Apprendi* motion because it informed jurors during the trial to ignore issues relating to weight of drugs in a drug conspiracy trial. In applying *Apprendi* the Court reasoned that the statute called for proof of an element of the crime,

namely: ". . . the intent to distribute five or more kilograms of cocaine. . ." yet that function was taken away from them by the Court. As a result the Court computed the defendant's sentence on the basis of its computations under the Guidelines, to wit: Level 43. It did so on the basis of enhancements contained in the Guidelines including its finding that the defendant lied under oath when he testified during the trial. Absurdly, the Court reasoned that the defendant testified and the jury convicted him. Therefore, the Court erroneously concluded that the defendant must have been lying under oath when he testified. This was a conclusory finding by the Court of perjury which allowed it to enhance the defendant's sentence. In addition, the Court determined that the quantity of drugs involve was in excess of 900 kilograms. Neither of these factors were determined by a jury with proof beyond a reasonable doubt. Yet, they were *ratio decidendi* for sentencing the defendant to the maximum term of imprisonment of 20 years in prison.[8]

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[8] It should be noted that Judge Pauley made this determination on the basis of the fact that he was the Trial Judge and heard the evidence. He drew his conclusions by a preponderance of the evidence but never said so and did not make findings of fact on the record. In New York, a *Fatico* hearing would have been meaningless in terms of changing this outcome because Judge Pauley was the trial judge and the outcome of a *Fatico* hearing would also be governed by the inadequate standard of proof by a preponderance of the evidence instead of proof beyond a reasonable doubt. See U.S. v. Fatico, 603 F.2d 1053 (1979). Remarkably *Moises* also had to contend with the problem of not being afforded his right to cross-examine during the trial when hearsay statements, plea allocutions and sworn statements from co-conspirators were received into evidence over objection. See Crawford v. Washington, 124 S.Ct. 1354, 158 L.Ed. 2d 177 (2004). See also Thomas F. Liotti, A War On Drugs: At What Cost To Our Liberty?, Perspective, New York Law Journal, February 28, 1990 at 2 and The Nassau Lawyer, April, 1990 at 2.



### A. The Sixth Amendment Protects Against Encroachments on the Right to Jury Trial by Any Branch of Government

The government's singular focus on what it views as the judicial character of the Guidelines completely misses the mark. The right of an accused" to trial by jury is protected in our Constitution twice - in Article III, § 2, cl. 3, and in the Sixth Amendment. The placement of this core constitutional right in the Bill of Rights, rather than in Article I, shows that it makes no difference whether the Guidelines are "legislative" or "judicial" in character. The discussion of jury trials in Article III demonstrates that the Judicial Branch, in particular, is charged with protecting that right.

#### 1. Congress Controls the Guidelines Through its Enactment of Mandatory Minimum Sentences

Congress has repeatedly enacted mandatory minimum sentences that supersede the otherwise applicable Guideline ranges. Mandatory minimums control a sentence regardless of the appropriate Guidelines range for the offense. See, *e.g.* 21 U.S.C. 841 (mandatory minimums for manufacture or distribution of controlled substances); 18 U.S.C. 924(c) (mandatory minimums for use of a firearm in the commission of a crime of violence or drug trafficking crime).[9] Such

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[9] There are dozens more such mandatory minimum provisions in the federal code. Ian Weinstein, *Fifteen Years After The Federal Sentencing Revolution: How Mandatory Minimums Have Undermined Effective and Just Narcotics Sentencing*, 40 Am. Crim. L. Rev. 87, 99 & n.56 (2003) (citing U.S. Sentencing Comm'n, Special Report to Congress: Mandatory Minimum Penalties in the Criminal Justice System (1991)).

congressionally mandated minimums thus "prevent the commission from carrying out its basic, congressionally mandated task: the development, in part through research, of a rational, coherent set of punishments." Justice Breyer, 14-SPG at 33; see generally U.S. Sentencing Comm'n, *Special Report to Congress: Mandatory Minimum Penalties in the Criminal Justice System* (1991). They also "transfer sentencing power from the courts to the prosecution" by precluding a District Court from departing below the mandatory minimum except on the request of the prosecution. Mandatory Minimum Penalties, at iii; see 18 U.S.C. 3553(e).[10]

In short, mandatory minimums "skew the entire set of criminal punishments, for Congress rarely considers more than the criminal behavior directly at issue when it writes these provisions". Justice Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 14-SPG Crim. Justice 28, 33 (1999). When a court sentences in a case involving a mandatory minimum that exceeds the applicable Guidelines range, it has no discretion at all, but rather must sentence exactly at the statutory minimum, so as to come as close as possible to satisfying the Guidelines without violating the conflicting statute. The fact that Congress can and perpetually does impose this kind of distortion further demonstrates that sentencing under the Guidelines operates pursuant to a

[10] *See also* The Hon. Anthony M. Kennedy, Address to the American Bar Association (Aug. 9, 2003) http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html ("Under the federal mandatory minimum statutes a sentence can be mitigated by a prosecutorial decision not to charge certain counts. There is a debate about this, but in my view a transfer of sentencing discretion from a judge to an Assistant U.S. Attorney, often not much older than the defendant, is misguided . . . Most of the sentencing discretion should be with the judge, not the prosecutors.").



legislative scheme, not a judicial one.

## II. The Sentencing Reform Act, Guidelines and Federal Rule of Criminal Procedure 32 are all Unconstitutional as Presently Applied

In answering the second question presented, this Court should reject the government's argument that the District Courts should treat the Guidelines as merely "advisory," a proposal that both lacks any internal coherence and runs contrary to Congress's principal goal of producing sentencing uniformity. The Court should instead require sentence-enhancing facts to be alleged in the indictment and proved beyond a reasonable doubt to the jury in a bifurcated sentencing hearing. Under this system, the jury would not act as a "sentencing jury" - *i.e.*, it would not actually "select an appropriate sentence from within a statutory range of punishment" (Nancy J. King & Roosevelt L. Noble, *Felony Jury Sentencing in Practice: A Three-State Study*, 57 Vand. L. Rev. 885, 886 (2004) - but instead would simply find the relevant facts. The judge would then determine an appropriate sentence within the applicable Guidelines range.

From 1987 through 2000 there have been no fewer than six amendments to the Federal Sentencing Guidelines. Each year the Federal Sentencing bureaucracy grows and concomitantly so does the Bureau of Prisons. The power of the judiciary becomes less and less.[11] According to the Department of Justice, there are now over one hundred federal prisons and nearly five million people incarcerated including those in post

[11] See Daniel Wise, Justice Department Directive Curtails Prison Bureau Practice, Dozens of Inmates Seek to Preserve Assignments to Halfway Houses, New York Law Journal, January 31, 2003 at 1 and 3

release status. This tragedy for our society shows that one person in every two hundred eighty is in jail and that we have turned from being a nation that aspired to rehabilitation and redemption to one that favors retribution and dire punishment instead. The Federal Sentencing Guidelines are becoming more like Draco's Ancient Grecian Penal Code, byzantine in character and complexity, so that those accused of crimes have little understanding of the punishments they face. Only the elite members of our society, the Judges, the lawyers and Probation have access and understanding of the Guidelines. Today one must have the Rosetta Stone to understand the hieroglyphics that have become the Guidelines.

Prior to November 1, 1987 lawyers would review the pre-sentence report of their clients; prepare memoranda and have oral argument on the day of sentencing. Those arguments would typically include legal matters as well as psycho-social issues. Today computers and the Guidelines do all of our thinking for us. They help us to calculate. The Guidelines are a science reserved for the elite members of our society. We file objections and on the day of sentencing there is some discourse about base levels, criminal history, etc., all leading to a mathematical calculation which metes out a finite sentence for anyone and everyone fitting that criteria. There is no meshing of psychology or social science with the law. Indeed there is no psychological testing routinely done of defendants facing sentencing. It is a case of "one size fits all." Individuality and uniqueness are things of the past. When it comes to federal sentencing everyone has the same D.N.A.

Some years ago a few members of the judiciary opined



that federal sentencing gave our courts "play in the joints."[12] Today those joints are badly afflicted with arthritis. Federal sentencing has become a "blood sport" for Kings with the prosecutors usually winning out over the Judiciary and defense lawyers. Armed with mandatory minimum sentences and the Guidelines, prosecutors are able to take aim at their "sitting ducks," the defense attorneys and their clients, who are nominal participants in most sentencing proceedings.

The Sixth Amendment of the United States Constitution provides for speedy and public trials by jury. But, federal sentencing takes us into the dark corners of the criminal justice system, to the underbelly of it. The disparities that the Guidelines sought to cure have been exacerbated by back room deals and the infamous 5K1.1 letters that have turned our country into a nation of "rats," "snitches" and informants. We allow for the admission of hearsay in drug conspiracy cases and that too compels more and more defendants to avoid trials. Our prisons are overflowing but Correctional Officers and their unions proudly wear tee shirts with a logo and drawing of a federal prison on it. It reads: "If you build them, they will come." And come they have, at a cost to our taxpayers ($35,000 to $50,000 per inmate/annum) of untold billions of dollars. But there are alternatives. Something can be done to reverse the undisclosed, national scandal and the destruction of our Bill of Rights. Something can be done to check the unknowing and unthinking politicians who favor the anachronistic words of Alice In Wonderland's notorious Red Queen, "First off with their heads and then the trial."

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[12] Deborah Pines, Ten Years Later, Federal Sentencing Guidelines Go Down Easier, Seen As Allowing Judges More Flexibility Than Anticipated, New York Law Journal, November 3, 1997 at 1, 6 and 7.

Except for the Eighth Amendment's admonishment against "cruel and inhuman" treatment our Founders gave little consideration to sentencing. Instead they provided for by trials by jury. This they nobly believed would preserve a democratic, free, compassionate and thoughtful society. Trials by jury were preferred over trials by compurgation, The Bridge of Assize and the Crucible's Salem Witch Trials where even dogs were convicted by innuendo, speculation, rumor and the pointing of fingers.

Federal sentencing today is much like the Salem Witch Trials. The Government may offer all manner of hearsay against the accused. If a defendant has been unlucky enough to be debriefed with the zero protection that a so-called "Queen for a Day Letter" provides, then all of his admissions may be used against him at the time of sentencing. Those same letters are used to discourage defendants from testifying at their trials because their admissions may be used against them at trial.

Following debriefings and "Queen for a Day Letters," prosecutors are free to reject the defendant's proffered cooperation. Then the defendant has even less of an inducement to go to trial. He has already admitted to the crime in a proffer session, a plea bargain session that has gone awry and where the Government has decided that they do not need the defendant's help. Of course, they know everything about defendants before they sit down for a proffer session. Usually they have decided in advance whether they will give defendants proffer agreements or not. The proffer session is then unfairly used as a discovery tool by the prosecution in order to learn about defenses and whether the accused will be cross firing at fellow defendants or simply wait for the proverbial ax to fall. Blind faith in a failed system, the Government and prosecutors, are frequently the hope of cooperators only to learn to their



heartfelt dismay that their fate has already been decided by co-conspirators who arrived at the prosecutors door ahead of them or because they are not needed for the Government's case. After being rejected as a "cooperator," the lowest common denominator in the criminal justice system, what possible hope can a defendant have of succeeding at trial. The answer is none. By putting all of his or her expectations on a 5K1.1 letter, the alternatives are to take a plea without it and face mandatory minimum sentences or go to trial where the Government is armed with everything that the defendant has told them during their debriefing sessions. The alternative of a fair trial by a jury of one's peers does not exist because it has been taken away from us by the Federal Sentencing Guidelines. The Bill of Rights and our revered Sixth Amendment have been superseded by the United States Sentencing Commission and their diabolical Guidelines.

## CONCLUSION

This *amicus curiae* apologizes to Justice Breyer and the other former and present members of the United States Sentencing Commission for being critical of their well intentioned work product. Yet, much as Lenin may not have foreseen the creation of what famed Russian writer Aleksandr I. Solzhenitsyn referred to as The Gulag Archipelago, so too it must be that the United States Sentencing Commission had no idea of the evil that would be wrought from their efforts.

Respectfully submitted,

THOMAS F. LIOTTI
Counsel of Record